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Supreme Court, U.S.
FILED
JUL 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1717

In the Supreme Court of the United States

OCTOBER TERM, 1988

FELIPE BONILLA ROMERO,
A/K/A FELO BONILLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause barred petitioner's trial in federal court after a local Puerto Rico court granted his motions to suppress evidence in a local prosecution.

2. Whether, under the doctrine of collateral estoppel, the decision of a local Puerto Rico court to suppress evidence in a local prosecution should bar the government from seeking to have the evidence admitted in a federal prosecution.

3. Whether separate sentences may be imposed for the simultaneous possession of two different controlled substances, in violation of 21 U.S.C. 841(a)(1).

4. Whether the district court abused its discretion during the suppression hearing by (a) denying petitioner's requests for a continuance, and (b) placing on petitioner the initial burden of producing evidence.

5. Whether the sentences imposed on petitioner constituted cruel and unusual punishment.

6. Whether the district court properly denied petitioner's motion to suppress evidence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A12-A25) is reported at 836 F.2d 39. The opinion of the district court (Pet. App. A1-A11) is reported at 639 F. Supp. 1021.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1987. A petition for rehearing was denied on February 17, 1988 (Pet. App. A26). The petition for a writ of certiorari was filed on April 18, 1988 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the District of Puerto Rico, petitioner was convicted of possession of cocaine with intent to distribute it (Count 1) and possession of heroin with intent to distribute it (Count 2), both in violation of 21 U.S.C. 841(a)(1). He was also convicted on two counts of receiving firearms shipped in interstate commerce after having been convicted of a felony (Counts 3 and 5), in violation of 18 U.S.C. 922(h)(1). Petitioner was sentenced to consecutive terms of 15 years' imprisonment on Counts 1 and 2, to be followed by a five-year special parole term, and concurrent terms of five years' imprisonment on Counts 3 and 5. The district court also imposed a total of $100,000 in fines on Counts 1 and 2.

1. On September 18, 1985, Officer Caín Santiago of the Puerto Rico police department observed signs of two drug transactions while he was conducting surveillance of petitioner's residence from a van parked nearby. At 9:30 a.m., an automobile pulled up to petitioner's house, and the driver got out and went inside. About five minutes later, the driver emerged carrying a clear plastic bag that contained a white powder. After holding the bag up and examining it in the sunlight, the driver returned to his automobile and departed.

An hour later, another automobile arrived. The driver got out, walked up to petitioner's house, and called out to him. Petitioner then came out and handed the driver a clear plastic bag containing a white powder. After giving petitioner some money, the driver returned to his automobile and drove away. As the automobile was leaving, Officer Santiago noted its license plate number and reported it to police headquarters. Shortly afterward, Of-

ficer Santiago was informed that the automobile had been reported stolen.

After the second transaction, Officer Santiago returned to headquarters to report his observations to his supervisor. Another officer, Angel Negrón, then drove Officer Santiago back to petitioner's residence. When they arrived there, Officer Negrón locked Santiago in the van and left the area on foot. Officer Santiago resumed the surveillance.

At approximately 1:35 p.m., petitioner came out of his house with a black pistol tucked in the left side of his waistband. When petitioner reached his automobile, he pulled the pistol from his waistband, got into the automobile, and drove away. Officer Santiago relayed by radio the license plate number of petitioner's automobile to Officer Negrón, and he told Officer Negrón to arrest petitioner (whom Officer Santiago knew to be a convicted felon) because he was carrying a gun.

When he received the radio message, Officer Negrón was in a police car with three other officers looking for the stolen car that Officer Santiago had seen at petitioner's house earlier that morning. Officer Negrón and the other officers located petitioner at a nearby gas station, where they arrested him. During the ensuing search, the officers found two clear plastic bags of white powder in petitioner's possession, and they found the pistol inside a clutch purse between the two front seats of the automobile. Later that day, petitioner was charged with violations of the local narcotics and weapons laws. After his arraignment, petitioner was released on bail.

The following day, Officers Santiago and Negrón submitted affidavits to a local judge and obtained a search warrant for petitioner's residence. The officers executed the warrant later that evening. Petitioner was seated on the

sofa with his wife as the officers entered and, when petitioner stood up, the officers observed a brown bag partially hidden behind his wife. The officers seized the bag, which contained 136.87 grams of cocaine, 74.76 grams of heroin, drug-related paraphernalia, and a Colt .45 pistol with a loaded magazine. Petitioner was again arrested, and he was charged with additional violations of the local narcotics and weapons laws.

2. In the course of the local prosecution, petitioner moved to suppress the evidence seized during his arrest at the gas station and during the execution of the search warrant for his house. After an evidentiary hearing, the Superior Court of Puerto Rico expressed serious doubts about the veracity of the officers whose testimony was presented to support the warrantless search of petitioner's automobile and whose affidavits provided the basis for the issuance of the warrant to search his house. The superior court granted the motions to suppress and issued its opinion and order on May 13, 1986. The local prosecution was then dismissed.

In the meantime, petitioner was indicted by the federal grand jury in Puerto Rico on February 19, 1986. Six days before the scheduled trial date, petitioner moved for suppression of the evidence and for a continuance. On May 12, 1986, the district court granted a continuance of the trial and scheduled an evidentiary hearing on the motions to suppress for the next day. The district court, however, denied petitioner's request for a continuance of the suppression hearing until the local court filed its decision and a transcript of the proceedings in that court was prepared. During the suppression hearing, petitioner requested another overnight continuance to produce additional witnesses, and the district court denied that request. Following the evidentiary hearing, the district court denied

petitioner's motions to suppress the Beretta pistol that was seized during his arrest and the narcotics and Colt .45 pistol that were seized during the search of his house. Pet. App. A1-A11.

3. The court of appeals affirmed (Pet. App. A12-A25). The court first rejected petitioner's claim that the Double Jeopardy Clause barred the federal prosecution after the Superior Court of Puerto Rico granted his motions to suppress and dismissed the local prosecution (*id.* at A14-A15). The court concluded (*id.* at A15) that petitioner was not placed twice in jeopardy for the simple reason that jeopardy did not attach at the pretrial suppression hearing in the local court. The court also rejected petitioner's argument that the principle of collateral estoppel precluded relitigation of the suppression issue as a matter of due process (*id.* at A16-A19). Without deciding whether collateral estoppel generally applies in the absence of the attachment of jeopardy, the court held that collateral estoppel did not apply "under the facts of this case [because] Puerto Rico and federal law enforcement officials were not in privity during the local pretrial suppression hearing" (*id.* at A19).

On the merits of petitioner's claim that the evidence against him should have been suppressed, the court of appeals upheld the district court's denial of the motions to suppress (Pet. App. A21-A22). The court of appeals also held that the district court did not abuse its discretion when it denied petitioner's requests for a continuance of the suppression hearing (*id.* at A19-A20).

Finally, the court of appeals upheld the consecutive sentences imposed by the district court on Counts 1 and 2 (Pet. App. A22-A25). The court rejected petitioner's argument that his possession of the heroin and the cocaine constituted only one offense because both controlled substances were found in the same bag during the search

of his house (*id.* at A22-A23). The court noted (*id.* at A23) that heroin is a Schedule I drug whereas cocaine is a Schedule II drug, and it held (*id.* at A24) that "the imposition of consecutive sentences for the simultaneous possession of a Schedule I and a Schedule II drug with intent to distribute is neither barred by the double jeopardy clause nor inconsistent with congressional intent in enacting section 841(a)(1)." The court also rejected petitioner's claim that the consecutive maximum sentences on Counts 1 and 2 constituted cruel and unusual punishment (Pet. App. A24-A25).

ARGUMENT

1. Petitioner first renews his contention (Pet. 11-19) that the Double Jeopardy Clause barred his federal prosecution after the Superior Court of Puerto Rico granted his motions to suppress and dismissed the local prosecution. The protections of the Double Jeopardy Clause, however, "are implicated only when the accused has actually been placed in jeopardy." *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977); see also *Justices of Boston Municipal Court* v. *Lydon*, 466 U.S. 294, 320 (1984) (Brennan, J., concurring in part and concurring in the judgment); *Crist* v. *Bretz*, 437 U.S. 28, 32-33 (1978); *Serfass* v. *United States*, 420 U.S. 377, 388 (1975). Unless jeopardy "attached" at the pretrial suppression hearing in the local prosecution, the Double Jeopardy Clause has no application here.

Petitioner's assertion that jeopardy did attach (Pet. 12-13) is plainly wrong. As the court of appeals observed (Pet. App. A15), jeopardy does not attach in a criminal proceeding until the trial commences. See, *e.g.*, *Crist* v. *Bretz*, 437 U.S. at 37-38 & n.15; *Martin Linen*, 430 U.S. at 569; *Serfass*, 420 U.S. at 388. Indeed, this Court em-

phasized in *Serfass,* 420 U.S. at 391-392, that "[w]ithout risk of determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy." Accordingly, since petitioner was never brought to trial before the Superior Court of Puerto Rico, the court of appeals correctly concluded that his federal prosecution was not barred by the Double Jeopardy Clause.

Petitioner's reliance (Pet. 13) on *Smalis* v. *Pennsylvania,* 476 U.S. 140 (1986), is misplaced. *Smalis* involved a midtrial ruling, not a pretrial ruling, and there was no doubt that jeopardy had attached. Although petitioner contends that the pretrial dismissal of the local prosecution in this case was the "functional equivalent" of a midtrial dismissal for insufficiency of the evidence and should have the same double jeopardy consequences (Pet. 13), this Court rejected just such an argument in *Serfass,* 420 U.S. at 392 ("Petitioner's second premise, that the disposition of his motion to dismiss the indictment was the 'functional equivalent of an acquittal on the merits,' * * * need not * * * long detain us."). In this case, as in that one, petitioner's argument runs afoul of "the fundamental principle that an accused must suffer jeopardy before he can suffer double jeopardy" (*id.* at 393).[1]

2. Petitioner also contends (Pet. 14-18) that the principle of collateral estoppel barred relitigation of the suppression issues in the district court after the Superior Court of Puerto Rico granted the motions to suppress in the local prosecution. That contention is without merit.

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[1] In any event, under the dual sovereignty doctrine, the United States would have the right to prosecute petitioner even if jeopardy had attached in the local proceedings and Puerto Rico were barred by the Double Jeopardy Clause from further prosecution. See *United States* v. *López Andino,* 831 F.2d 1164, 1168 (1st Cir. 1987), cert. denied, No. 87-6581 (May 31, 1988); Pet. App. A15 n.10.

a. Contrary to petitioner's contention (Pet. 14), it is not at all well settled that the doctrine of collateral estoppel applies in successive criminal prosecutions when jeopardy did not attach in the prior proceeding. In *Ashe* v. *Swenson,* 397 U.S. 436 (1970), this Court concluded that the government can be collaterally estopped from relitigating an issue necessarily determined in a defendant's favor after he was acquitted by a jury on another charge. The Court made clear, however, that its conclusion was based squarely on the Double Jeopardy Clause (397 U.S. at 445). To be sure, the Second Circuit has suggested that collateral estoppel may also apply as a matter of due process to prohibit the government from relitigating a pretrial suppression order in a criminal case. See *United States ex rel. DiGiangiemo* v. *Regan,* 528 F.2d 1262, 1265-1267 (2d Cir. 1975), cert. denied, 426 U.S. 950 (1976). But, as the court of appeals noted (Pet. App. A16 n.11), the other courts of appeals that have considered that suggestion have refused to express either their approval or their disapproval of it.

In any event, the court of appeals expressly refrained from deciding that issue in this case (Pet. App. A17). Instead, the court assumed that the principles of collateral estoppel applied, but held that the federal prosecutors were not collaterally estopped from relitigating the suppression issues on the facts of this case because there was no privity between them and the local prosecutors (*id.* at A19). As the court explained, there was nothing to suggest that "federal prosecutors were, or should have been, involved in any way in the local prosecution" (*id.* at A18). The court also observed that the local suppression hearing "concerned purely local charges over which the federal enforcement officials had no authority and thus no interest" (*ibid.*). The court accordingly saw "no reason why the

principles of fairness, justice, and judicial economy embodied in the doctrine of collateral estoppel require that this doctrine be expanded to bind a party so remote from the action decided" (*id.* at A18-A19).

Petitioner argues that the principles of collateral estoppel necessarily applied because Puerto Rico is a coordinate federal jurisdiction for purposes of the dual sovereignty doctrine. That argument is wrong for two reasons. First, Puerto Rico is a separate sovereign for purposes of the dual sovereignty doctrine (see note 1, *supra*). Second, even if Puerto Rico were a coordinate federal jurisdiction for purposes of that doctrine, it would not follow that the federal prosecutors in this case were collaterally estopped from relitigating issues resolved in Puerto Rico proceedings with which they had no connection. The dual sovereignty doctrine is an interpretation of the Double Jeopardy Clause to allow separate sovereigns to bring successive prosecutions for conduct that violates each sovereign's laws. See, *e.g.*, *Heath* v. *Alabama*, 474 U.S. 82, 87-91 (1985). The Double Jeopardy Clause, however, was not implicated here because jeopardy did not attach at the local suppression hearing; the issue was simply whether the principle of collateral estoppel should be applied as a matter of due process. As the court of appeals explained (Pet. App. A17-A18), the source of authority of two government entities is relevant but not dispositive in that context. When, as in this case, the two prosecutions were brought by different prosecuting entities and involved violations of the criminal statutes of separate legal systems, it is appropriate to deny collateral estoppel effect to the local court's suppression order, even if the governments of Puerto Rico and the United States were not considered "separate sovereigns" for purposes of the Double Jeopardy Clause. Cf. *Davis* v. *Eide*, 439 F.2d 1077, 1078 (9th Cir.), cert. denied, 404 U.S. 843 (1971).

b. Petitioner's related contention that the district court should not have conducted its own suppression hearing (Pet. 18-19) is likewise without merit. It is well settled that the admissibility of evidence in a federal criminal prosecution is a question of federal law, not state law, and that evidence may be admitted at trial if a search was valid under federal law, regardless of its legality under state law. *Elkins* v. *United States,* 364 U.S. 206, 224 (1960); see also *Preston* v. *United States,* 376 U.S. 364, 366 (1964); *On Lee* v. *United States,* 343 U.S. 747, 754-755 (1952).

Petitioner argues, however, that a federal court should not conduct a separate evidentiary hearing when a state court decides to suppress evidence based on a factual finding (Pet. 18). There is simply no basis for that argument, and petitioner cites none. Rather, as the Court observed in *Elkins,* 364 U.S. at 223-224:

> In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed.

The federal court's obligation to make its own determination of the legality of a search extends to factual and legal determinations alike.

3. Petitioner next contends (Pet. 19-25) that his consecutive sentences for posssession of both cocaine (Count 1) and heroin (Count 2) with intent to distribute them, in violation of 21 U.S.C. 841(a)(1), constituted multiple punishment prohibited by the Double Jeopardy Clause. In his view, the simultaneous possession of both heroin and

cocaine in one bag constituted possession of a single "controlled substance" under Section 841(a)(1) for which only one sentence could be imposed. That contention has been rejected by every court that has addressed it. See *United States* v. *DeJesus,* 806 F.2d 31, 35-37 (2d Cir. 1986), cert. denied, 479 U.S. 1090 (1987); *United States* v. *Grandison,* 783 F.2d 1152, 1155-1156 (4th Cir.), cert. denied, 479 U.S. 845 (1986); *United States* v. *Davis,* 656 F.2d 153 (5th Cir. 1981), cert. denied, 456 U.S. 930 (1982); see also *United States* v. *Pope,* 561 F.2d 663, 669 (6th Cir. 1977).

The permissibility under the Double Jeopardy Clause of cumulative punishment for particular conduct is a matter of legislative intent. See *Ohio* v. *Johnson,* 467 U.S. 493, 499 & n.8 (1984); *Missouri* v. *Hunter,* 459 U.S. 359, 366, 368 (1983); *Whalen* v. *United States,* 445 U.S. 684, 691-693 (1980). This Court "has consistently relied on the test of statutory construction stated in *Blockburger* v. *United States,* 284 U.S. 299, 304 (1932), to determine whether Congress intended the same conduct to be punishable under two criminal provisions." *Ball* v. *United States,* 470 U.S. 856, 861 (1985). In the absence of a clear expression of legislative intent to the contrary, consecutive sentences are appropriate under *Blockburger* if each statutory provision requires proof of at least one fact not required by the other. *Albernaz* v. *United States,* 450 U.S. 333, 340 (1981).

In this case, the court of appeals applied the *Blockburger* test and concluded that separate sentences for each violation of Section 841(a)(1) were authorized because each violation "requires proof of an independent fact; *i.e.,* the identity of the drugs themselves" (Pet. App. A23). The court also observed that that conclusion was "consistent with the plain meaning of § 841(a)(1) which creates a violation for possession of 'a controlled

substance,' not for 'a controlled substance or group of controlled substances' " (*id.* at A24). The court further found (*ibid.*) that the plain meaning of the statute was consistent with Congress's intent. The Second and Fourth Circuits have used the same approach to reach the same conclusion. *United States* v. *DeJesus, supra; United States* v. *Grandison, supra.*

Petitioner's reliance on *United States* v. *Davis, supra,* as reflecting a conflicting view is unavailing. To be sure, the Fifth Circuit in *Davis* declined to apply the *Blockburger* test in this context, reasoning that the simultaneous possession of two different controlled substances involves two offenses under a single statutory section, as opposed to a single act violating two statutory provisions (656 F.2d at 156-157). Relying on *Bell* v. *United States,* 349 U.S. 81 (1955), the Fifth Circuit believed that the appropriate inquiry was whether Congress intended to treat the simultaneous possession of different controlled substances as one act or multiple acts (656 F.2d at 157-158). After reviewing the legislative history, the Fifth Circuit concluded that consecutive sentences were permissible because "[w]hen Congress set penalties for possession of 'a controlled substance,' it intended to permit trial courts to penalize possession of 'each' controlled substance" (*id.* at 159). Consequently, it is clear that, even though it would reach the result by a different route, the Fifth Circuit would agree with the court below that petitioner was subject to cumulative punishment for his simultaneous possession of both heroin and cocaine.

The ultimate issue of the legality of consecutive sentences in a particular case turns on whether Congress intended to permit multiple punishments, regardless whether the *Blockburger* test or the *Bell* test applies. See *Garrett* v. *United States,* 471 U.S. 773, 779 (1985); *Bell* v. *United States,* 349 U.S. at 82-83. Here, the courts of ap-

peals agree that Congress has manifested its intention to authorize separate and cumulative punishments under Section 841(a)(1) for the possession of different controlled substances at the same time. Although petitioner disputes that conclusion about Congress's intent (Pet. 24), he points out nothing in the legislative history that shows that Congress intended to permit only a single sentence for the simultaneous possession of different controlled substances. Since the courts of appeals have uniformly reached the opposite conclusion, petitioner's contention does not warrant further review.

4. Petitioner further contends (Pet. 25-27) that he was deprived of a fair trial during the evidentiary hearing on the motions to suppress. Specifically, petitioner complains that the district court abused its discretion in denying his two requests for a continuance and improperly placed on him the burden of going forward to show that the searches and seizures were illegal. The court of appeals correctly rejected those contentions.

It is well settled that a trial court has broad discretion to grant or deny continuances. See, *e.g.*, *Morris* v. *Slappy*, 461 U.S. 1, 11 (1983); *Avery* v. *Alabama*, 308 U.S. 444, 446 (1940). In this case, the court of appeals noted that petitioner had "ample opportunity" to obtain a transcript of the suppression hearing in the Superior Court of Puerto Rico and to line up his witnesses before the suppression hearing began (Pet. App. A19). Moreover, the court observed that petitioner's first request for a continuance was based "on the incorrect belief that the district court would be constrained by the Superior Court's decision due to principles of double jeopardy or collateral estoppel" (*id.* at A20). The court also stated that petitioner "never clearly asserted his need of the transcript for impeachment purposes, which he nonetheless could have obtained prior to the hearing and without a continuance"

(*ibid.*). In any event, as the court of appeals emphasized, "the district court waited until after it had received the Superior Court's opinion on that court's decision to suppress the evidence before it rendered its own opinion on the matter" (*ibid.*). And the court of appeals determined that petitioner was not entitled to an overnight continuance, because he "had ample time to prepare for [the] hearing, no new issues were raised there, and yet he failed to subpoena a single witness" (*ibid.*). Those fact-bound conclusions do not warrant further review.

The court of appeals also correctly rejected petitioner's claim (Pet. 27-28) that the district court improperly placed on him the burden of going forward on the motion to suppress. As the court of appeals concluded (Pet. App. A20-A21), petitioner's contention simply "demonstrates a misunderstanding of the difference between burden of production and burden of persuasion." To be sure, the government bears the ultimate burden of persuasion that a warrantless search was lawful. *United States* v. *Jeffers,* 342 U.S. 48, 51 (1951); *McDonald* v. *United States,* 335 U.S. 451, 456 (1948); see also *United States* v. *Longmire,* 761 F.2d 411, 417 (7th Cir. 1985). The party moving to suppress the evidence, however, must first make the initial showing that the search occurred without a warrant and that he had an expectation of privacy in the seized item. See *United States* v. *Bachner,* 706 F.2d 1121, 1125-1126 (11th Cir.), cert. denied, 464 U.S. 896 (1983); *United States* v. *De La Fuente,* 548 F.2d 528, 533-534 (5th Cir.), cert. denied, 434 U.S. 954 (1977); cf. *Rawlings* v. *Kentucky,* 448 U.S. 98, 104 (1980).

5. Petitioner also contends (Pet. 28) that the imposition of consecutive maximum 15-year sentences on Counts 1 and 2 constituted cruel and unusual punishment in viola-

tion of the Eighth Amendment.[2] Petitioner, however, had seven prior felony convictions for drug and weapons violations (Pet. App. A21). The sentence he received was within statutory limits and was considerably less harsh than the sentences that others with shorter criminal records have received for much less serious offenses. See *Hutto* v. *Davis*, 454 U.S. 370 (1982); *Rummel* v. *Estelle*, 445 U.S. 263 (1980); see also *Solem* v. *Helm*, 463 U.S. 277, 290-292 (1983). This Court's decisions upholding those sentences against Eighth Amendment attack preclude any successful Eighth Amendment argument by petitioner.

6. Finally, petitioner contends (Pet. 28-29) that the district court erred in denying his motion to suppress the Beretta pistol seized during his arrest and the Colt .45 pistol and narcotics seized during the search of his house. Those fact-bound contentions do not warrant further review.

a. Petitioner claims that the Beretta pistol should have been suppressed because the arresting officers lacked probable cause to arrest him. The court of appeals correctly concluded, however, that the arresting officers had probable cause to believe that petitioner was committing an offense, based on the information supplied by Officer Santiago, who had observed petitioner enter his automobile with the pistol (Pet. App. A21-A22). Because Officer Santiago was aware that petitioner was a convicted

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[2] Because petitioner's offenses were committed on September 18, 1985, the maximum term of imprisonment for each offense was 15 years. See 21 U.S.C. (Supp. II) 841(b)(1)(B). Congress has recently revised and increased the maximum penalties for violations of Section 841(a) in the Anti-Drug Abuse Act of 1986 (Pub. L. No. 99-570, Tit. I, §§ 1002, 1003(a), 1103, Tit. XV, § 15005, 100 Stat. 3207-2, 3207-5, 3207-11, 3207-192). Under that Act, petitioner would have been subject to a maximum term of imprisonment of 20 years. See 21 U.S.C. (Supp. IV) 841(b)(1)(C).

felon and did not have a license to carry a firearm, he clearly had probable cause to believe that petitioner was committing an offense. See 18 U.S.C. 922(h)(1).[3] And the arresting officers were entitled to rely on Officer Santiago's radio communications to arrest petitioner based on his personal observations. *United States* v. *Hensley,* 469 U.S. 221, 229-233 (1985); cf. *Whiteley* v. *Warden,* 401 U.S. 560, 568 (1971).

b. Petitioner also claims that the Colt .45 pistol and the narcotics should have been suppressed under *Franks* v. *Delaware,* 438 U.S. 154 (1978), because the search warrant for his house was based on false statements by Officer Santiago. That claim ignores the factual findings made and accepted by the courts below. After hearing the testimony of Officers Santiago and Negrón at the evidentiary hearing, the district court found "no reason to discredit affiants' truthfulness concerning the facts" and concluded that "no showing has been made * * * in the sense that false statements were included in the affidavit" (Pet. App. A11). The court of appeals accepted the district court's findings (*id.* at A22), and those findings therefore do not merit this Court's review. See, *e.g.*, *United States* v. *Doe,* 465 U.S. 605, 614 (1984); *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635 (1967).

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[3] Contrary to petitioner's contention (Pet. 29), it was not necessary that the information received by the arresting officers be "totally inconsistent" with innocent behavior in order for them to have probable cause to make the arrest. As this Court has explained, "it is clear that 'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.' " *Illinios* v. *Gates,* 462 U.S. 213, 235 (1983) (quoting *Spinelli* v. *United States,* 393 U.S. 410, 419 (1969)).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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JULY 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60531